BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES LOCAL NO. 75

and

THE CITY OF OCONTO

Case 46
No. 55702
MA-10071

(Grievance of R.B.)

Appearances:

Ms. Andrea F. Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

Mr. Mark A. Warpinski, Warpinski & Vande Castle, Attorneys at Law, 303 South Jefferson Street, P.O. Box 993, Green Bay, Wisconsin 54305, appeared on behalf of the City.

ARBITRATION AWARD

On November 17, 1997, the City of Oconto and Teamsters Local Union No. 75 advised the Wisconsin Employment Relations Commission that they had selected William C. Houlihan, a member of the Commission's staff, from a panel to hear and decide the captioned dispute. A hearing was conducted on March 10, 1998, in Green Bay, Wisconsin. The proceedings were not transcribed. Post-hearing briefs and reply briefs were submitted and exchanged by May 21, 1998.

This arbitration addresses the termination of employe R.B.

BACKGROUND AND FACTS

R.B., the grievant, was employed as the Assessor/Building Inspector/Assistant City Engineer for the City of Oconto for nearly four years prior to the date of his discharge. His

employment ended upon his discharge on October 13, 1997 by Michael Ottensmann, the Director of Public Services for the City of Oconto. The grievant was terminated by the following memo:

> To: R.B.
>
> From: Michael Ottensmann
> Director of Public Services
>
> Re: Job Performance
>
> I have previously provided you with a list of allegations regarding your job performance. I have given you opportunity to respond to those allegations.
>
> Additionally, I have received a complaint from Hall Abstract regarding the need for rezoning the property. You have had an opportunity to respond to that as well.
>
> From my investigation of this matter I am satisfied the following has occurred:
>
> 1. Your refusal to follow the Mayor's order not to attend the assessor's seminar in LaCrosse, Wisconsin constitutes gross insubordination.
>
> 2. You have failed to properly identify true property owners for purposes of their being notified of City proceedings which may adversely affect use of their property.
>
> 3. You have failed to properly follow instructions with respect to shooting surveys.
>
> The conduct described above adversely affects the orderly operations of the City with respect to your insubordination and adversely affects the rights of the public which is permitted by law to be informed of any actions taken by the City of Oconto which might affect their enjoyment of their private property.
>
> I have taken into consideration the seriousness of the offenses above-described and your past job performance. I have also taken into consideration past disciplinary actions and their dates of occurrence in reaching my decision.

I am satisfied for all of the above reasons that your employment with the City of Oconto must be terminated effective immediately. You must surrender all your keys to the building and return any equipment currently in your possession that belongs to the City of Oconto.

Dated this 13th day of October 1997.

Michael Ottesmann /s/
Michael Ottesmann, P.E.
Director of Public Services
City of Oconto

cc: Mayor Utecht
Lisa Weigelt
Mark Warpinski
Mike Williquette

The discharge was grieved the next day, October 14, 1997. The grievance was not resolved, ultimately leading to this proceeding.

The events set forth above had their origin in the spring of 1997. On Monday, April 7, 1997, the Oconto Utility Commission met and considered a number of measures. Four of the five Utility Commissioners were in attendance. Also in attendance were Michael Ottensmann, Mayor Utecht, and citizens seeking Commission action. Notably, Bill Imig approached the Commission seeking to have water service connected to his property. The official minutes of the Committee meeting (Joint Exhibit No. 5) reflect the following disposition of Imig's request:

. . .

9. D. Written request from Bill Imig to have water service to his property along Locust Street and Perrigo; Michael has stated this could be done in house; six to eight property owners are involved along this area; Michael will send each property owner a letter with front footage and approximate cost and ask for them to sign a waiver of special assessment; if some owners are against this project, and does not sign request, there will be a public hearing in the normal procedure to follow.

> Moved by Merenhausen, second by Longsine to recommend to Council to proceed with installing water service along Locust Street and Perrigo as discussed. Motion carried upon verbal vote – four ayes, one absent.

. . .

At the arbitration hearing, Mr. Imig testified that at the conclusion of the meeting noted above, he asked if he would get his permit. It was Imig's testimony that Ed Wilde, Chair of the Commission, indicated that the Council normally approved the Commission's recommendation. According to Imig, Wilde indicated that even if there were objections, it would not be a major issue because every project has objections.

Imig testified that at the conclusion of the meeting, there was a consensus that he would be issued a building permit. Imig indicated that no one told him he would face a delay. He further testified that Ottensmann was present during the discussion.

It was the grievant's testimony that on or about April 8 Ottensmann advised him that the Utility Commission had recommended water extension and that Imig wanted a building permit. The grievant testified that in this context he felt comfortable issuing the permit. It was his testimony that Ottensmann never indicated that no permit should be issued until City Council action occurred. Ottensmann denies any conversation in April relative to the issuance of a permit. It was Ottensmann's testimony that a permit discussion occurred in mid-summer.

The grievant issued Mr. Imig a building permit on April 22, 1997. The City Council had yet to take up the Utility Commission's recommendation. City ordinance requires Council approval for water service, prior to permitting construction. Upon receipt of his permit, Mr. Imig began to build. Ottensmann was not aware of the fact that Imig was building.

In order to extend water service to the subdivision involved, a special assessment was required. Such an assessment is prefaced by notice to property owners and a hearing. According to Ottensmann, the grievant was assigned responsibility to properly notify affected property owners. The grievant prepared a property owner's list in April. The list, consisting of seven names, had two errors.

A special assessment hearing was conducted on September 9, 1997. It was attended by a number of people, who vocally disapproved of water access. Following the hearing, the Council allowed water service, and a special assessment of $1,580 per parcel was levied on seven parcels. Following the hearing and Council action, on September 10 a number of angry people met with the Mayor. It was at this meeting that the Mayor first learned that certain people were not notified, and when he further discovered that Imig had been issued a building permit.

The Mayor, faced with some irate citizens and a flawed notice, vetoed the Council's approval of water installation. His veto was sustained.

This caused the approval process to start over. The grievant was directed to redo the list in September and he did so but still had one error. When Ottensmannn subsequently checked City Hall records, he discovered the correct information to be present. Mr. Imig had requested, and had received, a building permit and had a largely completed home. On the other side were a number of citizens irate that assessments had been levied against them without notice. Adjacent property owners were angry that Imig had secured a building permit and commenced construction prior to their having an opportunity to be heard on the installation of water and assessments. The project was ultimately approved. There was no assessment levied on one parcel, three were reduced substantially and the final three were assessed the original amount. City taxpayers absorbed the added cost.

The grievant was disciplined for his mishandling of the notice to adjacent property owners.

It was the grievant's testimony that on August 20, he asked Ottensmann for permission to attend a municipal assessor's institute. According to the grievant, Ottensmann asked for information about the cost of the program. In response, the grievant provided an itemized list of expenditures and gave that list to Ottensmann. The grievant testified that he had traditionally gone to this program, and that no approval from the Mayor or Council had ever been requested, or received. The grievant testified that he had gone to other programs where there was no mayoral or Council approval required. Ottensmann never indicated a need for approval, other than his own.

It was Ottensmann's testimony that the grievant told him that he would be attending the conference, and asked him to sign off. There was no discussion as to how much the conference would cost. Ottensmann authorized the issuance of reimbursement checks. On August 22, 1997, a registration check was issued over the signature of the Mayor and the City Clerk/Treasurer. The signature was produced by a signature machine. That same day, a separate check was issued to the hotel for lodging at the conference.

When Mayor Utecht discovered that the grievant was going to the conference, he asked Ottensmann about it. The Mayor testified that he told Ottensmann that he did not want the grievant going to the conference because of all of the problems that had arisen and were surrounding the issuance of the permit to Imig. In the Mayor's eyes, it was a critical time to assemble the appropriate landowner's names, and provide them with notice. There was a committee meeting coming up shortly.

The grievant was scheduled to leave to attend the conference on September 23. The evening before, September 22, the Mayor called the grievant at the grievant's home. According to the Mayor, the six to seven-minute conversation consisted of the following. The Mayor asked the grievant if he was going to the conference. The grievant responded "yes." The Mayor indicated that it "had never been approved." The grievant indicated that "Michael gave approval." The Mayor responded that it was "not by the Mayor or by the Council." The Mayor continued, indicating that he was "not going to allow him to go; if he went, he would be on his own." Mayor Utecht claims he repeated that he was not going to allow the grievant to go and that if he did he would be on his own. According to the Mayor, the grievant replied that "he had approval, that the fees had been paid, and that he was going anyway." On cross-examination, the Mayor acknowledged that he did not indicate that if the grievant went to the conference, he would be fired. He indicated that the grievant would be on his own. The Mayor also indicated that he did not believe he had to explain why he did not want the grievant to attend the conference.

The grievant has a different version of the September 22 conversation. According to the grievant, the conversation proceeded as follows: The Mayor asked if the grievant was going to the conference. The grievant replied "yes, he was going." The Mayor inquired as to "who approved" and the grievant replied "Michael". The Mayor indicated that "he didn't know if he really approved, that he may need Council approval." The Mayor continued, "If you go, you may be on your own." The grievant testified that he interpreted the Mayor's words to put him at risk of possibly paying his own expenses. According to the grievant, the Mayor never indicated that discipline was a possibility.

In response to a request from Ottensmann, the grievant prepared a written summary of events immediately prior to his discharge. With respect to this telephone conversation, the grievant's narrative (City Exhibit No. 3) contains the following entry:

> September 22, 97. Mayor Utecht called my home, told my wife to return his call.
>
> I returned call, Mayor Utecht stated "I hear you are going to some kind of convention. I said yes; the assessor conference at LaCrosse, he asked who approved this, I said Michael, who is my supervisor, the Council didn't approve this and I don't either, if you go, you will be going on your own, I said the reservations and checks were sent in on August 22, 97, he said well, I still don't approve it. I stated its a budgeted item and also in my job description to attend continuing education for my certification as assessor. The Mayor said I still don't approve. End of conversation.

The grievant left on September 23, attended the conference, and following the conference, submitted vouchers for meals received. Those vouchers were reimbursed on October 7, 1997.

It was the Mayor's testimony that the City has an unwritten policy obligating individuals who attend conferences to inform the Mayor and Council. Conference requests need approval. According to the Mayor, city employes follow the policy, though it has never been put in writing nor has it ever been voted on or approved by the Council. At the time, Ottensmann was a new supervisor and a new city employe, and was unaware of the policy. The Mayor indicated that Ottensmann believed he had the authority to approve attendance at this conference.

The final event referenced in the discharge letter involved surveying a grid of points. On September 3, 1997, Ottensmann directed the grievant to survey an area under construction. A road was being raised higher than the plane of land in a flat topography. Ottensmann directed the grievant to shoot a grid. Ottensmann testified that he directed the grievant to shoot a four by three grid. He indicates that he directed the grievant to shoot at the edge of the road, in the yard, and immediately adjacent to the house. It is Ottensmann's testimony that he demonstrated what he wanted by use of a diagram. It was Ottensmann's testimony that the grievant returned with an eight by two grid, with a shot on the road, and in the yard, but not near the house. Ottensmann was concerned that the work product was deficient in that it would not allow an accurate assessment of the runoff potential of the elevated roadway.

It was Ottensmann's testimony that he reiterated his instruction and sent the grievant back. He testified that the grievant followed his subsequent instruction and returned with the shots that were desired. Ottensmann testified that if the grievant had shot sufficient points, i.e. three places, his work product might have been all right.

The grievant testified that he did not recall Ottensmann directing a three by four grid. It was his recollection of the conversation that Ottensmann directed him to do what works and what fits the situation. When he brought the grid back, he was asked if he shot near the house. When he replied that he had not, he was directed to do so, and did. The grievant testified that there was never reference to discipline.

The grievant was subject to discipline in August, 1997. That discipline appears substantively unrelated to the matters in this proceeding, and was resolved by the following agreement:

AGREEMENT

The undersigned hereby agree to resolve the discipline issued to R.B. on August 13, 1997 as follows:

A. The suspension shall be reduced from 3 days to 1 ½ days. R. shall be reimbursed for the 1 ½ days of pay deducted from his compensation.

B. R. does not admit to any guilt associated with this incident.

C. The City shall not rely on this incident in any future discipline unless the conduct is related to inspections and notification of whereabouts.

D. This disciplinary action shall not be relied on as precedence by either party in any future action where flagrancy is the issue as referenced in the discharge provisions of the contract.

E. R.'s personnel file shall be expunged on August 19th, 1997 with respect to conduct while with previous employers. The parties acknowledge that the file has been expunged to R.'s satisfaction.

Dated this 19th day of August, 1997.

It was Ottensmann's testimony that "incidents prior to that time were settled". He believed that the grievant "started at zero" as of August 13. He testified that he became aware of the incidents leading to the discharge after August 13.

Sometime subsequent to his discharge, the City came to believe that the grievant was not a certified plumbing inspector. That qualification is a part of the grievant's job description. The Mayor evidently contacted the Wisconsin Department of Commerce seeking to know what licenses and/or credentials the grievant possessed. By letter dated November 20, 1997, the Wisconsin Department of Commerce responded indicating which areas of certification the grievant possessed. By letter of November 24, 1997, Ottensmann wrote the grievant as follows:

Dear Mr. B:

We have reviewed your original job description and application for employment. You were required to obtain plumbing certification through the State of Wisconsin. Please find enclosed a copy of the pertinent portion of the job description imposing that requirement.

You were employed for more than six months by the City of Oconto. At no time during that period did you obtain such certification. To that end, please find verification from the State of Wisconsin Safety and Buildings Division confirming that you do not hold a plumbing inspection certification. Accordingly, I have determined that you are not qualified to hold the position for which you were hired. If this information is in error, please advise.

ISSUE

The parties stipulated to the following:

Was R B. terminated for just cause?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 16 – Management Rights

The City possesses the sole right to operate the city government, and all management rights repose in it, subject only to the provisions of this contract and applicable law. Such rights include, but are not limited, to, the following:

. . .

D. To suspend, demote, discharge for just cause, and take other disciplinary action against employees;

E. To relieve employees from their duties because of lack of work or any other legitimate reasons;

. . .

Article 18 – Arbitration

The party desiring arbitration shall within five (5) working days after notifying the other party of its intent to arbitrate, request the Wisconsin Employment Relations Commission (WERC) to prepare a list of five (5) impartial arbitrators. The Union and the City shall then alternatively strike two (2) parties each on the slate with the party filing the grievance exercising the first and third strikes. The Union and the City shall exercise their strikes within fifteen (15) days following receipt of the slate from the WERC. The remaining arbitrator shall

then be notified of his or her appointment as chairperson in a joint statement from the union and a copy to the City.

It is understood that the arbitrator shall not have the authority to change, alter or modify any terms or provisions of this agreement.

The expense of the arbitrator shall be divided equally between the parties to this agreement.

Article 19 - Discharge

A. The Employer shall not discharge or suspend any employee without just cause, (except for probationary employees), and shall give at least one (1) warning notice against such employee to the employee in writing, and a copy of same to the union affected. No warning notice need be given to an employee before he is discharged due to dishonesty, being under the influence of intoxicating beverages while on duty, drug addiction, or other flagrant violations. It is recognized that progressive discipline principles shall apply with a normal disciplinary procedure including; first – verbal warning; second – written warning; third – suspension; fourth – discharge. It is additionally understood, however, that this procedure need not be followed in all cases depending on the severity of an offense.

   The warning notice provided herein shall not remain in effect for a period of more than nine (9) months from date of said warning. Discharge or suspension shall be in writing with a copy to the Union and to the employee affected.

B. Any employee desiring an investigation of his discharge, suspension or warning notice must file his protest with the Union and the Employer within fifteen (15) days, exclusive of Sundays and holidays, of the date the employee received such discharge, suspension or warning notice. The protest must be filed in writing.

C. The discharge, suspension or warning notice shall then be discussed by the Employer and the Union as the merits of the case. Failure to agree shall be cause for the issue to be submitted to arbitration as provided for in the arbitration clause of this Agreement.

D. Should it be found that the employee has been unjustly discharged or suspended, he shall be reinstated and be compensated for all time lost, except as otherwise determined by agreement between the Employer and the Union or by direction of the impartial arbitrator.

POSITIONS OF THE PARTIES

The Employer sets out its view of the facts, and makes credibility argument. The City thereafter argues that an employe may be discharged for insubordination, citing arbitral authority for that premise.

The Employer contends that the grievant is not eligible to hold his job. Pointing to the job description, the Employer notes that the Assessor/Building Inspector is required to be a certified inspector at the time of hire, or to be able to obtain that certification within six months of hire. The Employer contends that the grievant lacks plumbing inspection certification. The Employer cites Section 101.60, Wis. Stats., requiring "all inspections shall be by persons certified by the department." (Section 101.66, Wis. Stats.) The Employer notes that on November 24, 1997, it advised the grievant that he was ineligible to hold his position as Building Inspector/Assessor because he lacked certification. As of the hearing, the grievant lacked the appropriate certification. The City takes the position that the undersigned is without authority to reinstate the grievant to a position that he is not eligible to hold. To do so would exceed the arbitrator's lawful authority. The State, through its testing and certification process, has determined whether an individual is qualified to hold certain positions. This is not a requirement imposed by the City. The City contends that the undersigned is not free to waive this statutory obligation.

The City contends that it faces a very difficult task. It must now go through all one and two-family construction permits issued during the grievant's period of employment and have those structures reinspected by a certified inspector.

The City contends that the grievant was discharged for cause. It is the City's position that the grievant engaged in flagrant misconduct, constituting cause for his discharge. The City believes that progressive discipline is not required under the circumstances of this case.

The City notes that the grievant had just returned from a one and one-half day suspension without pay. The City claims it to be reasonable to assume that there would be an improvement in the employe's work performance and attitude. The City contends that every organization, be it paramilitary or not, has a right to expect that employes will follow the lawful orders of supervisors. The grievant was insubordinate on three separate occasions within a six-week period following his return from a disciplinary suspension. It marks the grievant's conduct as flagrant, as these acts of insubordination occurred within such a short period of time following disciplinary suspension.

The City notes that the first two alleged acts of insubordination; failure to obtain the proper names of taxpayers to be notified, and shooting grades as directed, by themselves would not constitute flagrant misconduct. However, the City contends that taken together, and the fact that they had occurred within such a short period of time following disciplinary suspension may rise to the level of flagrant misconduct.

It is the City's contention that the grievant's refusal to follow the Mayor's order not to attend the seminar constitutes flagrant misconduct.

In the alternative, it is the City's view that all three acts of insubordination taken together, support a conclusion that it was flagrant misconduct.

The City contends that the seed of the grievant's insubordination was planted and started germinating when he issued the building permit to Imig. The grievant knew on April 22, 1997, that the City Council had not approved the installation of water to Imig's property. He also knew that the property was not served by a well. In total disregard of the ordinance requirements, he issued the building permit.

The impact of the grievant's disregard of the rules played itself out when the City was required to hold a public hearing to determine whether water should be extended to Imig's property. The City became embroiled in a controversy which was occasioned by the fact that the grievant had issued a building permit and allowed someone to construct a home prior to the time that water was installed. The City was placed in a compromised position. The house had already been constructed. The City was in no position to order the property owner to take the house down. To do so would have brought about a lawsuit. Alternatively, the City had to face the wrath of property owners who did not want water installed on their street at that time. Property owners on Locust and Perrigo Streets were justifiably frustrated because they saw that a house had been constructed, and was forcing the issue of water installation to their property.

The City contends that while on the surface it might appear that the grievant's efforts to obtain the true property owner's identity was negligence, a more careful examination of his conduct leads to the conclusion that it was insubordination. The City points out that the information needed was readily available within mere feet of his office; i.e. at City Hall. Rather than look at the information that was readily available in his own building, and which contained the proper information, the grievant went to another source, County records. The City contends that any information he uncovered should have been crosschecked with information available at City Hall.

Pointing to the testimony of Ottensmann, the City contends that the grievant was told, and shown by way of illustrative drawing, how to shoot grades on the property. The City takes issue with the grievant's explanation as to his understanding of his direction. It is the City's position that his statement in the arbitration hearing is inconsistent with the handwritten response he provided a month after the incident in 1997. His handwritten response makes no reference to the fact that he was allegedly given wide latitude to shoot grade in whatever way he thought appropriate.

The City contends that the Mayor called the grievant, and pursuant to his lawful exercise of authority, directed him not to attend the seminar. It is the City's view that the grievant made a conscious decision to defy the order of the Mayor and attend the conference notwithstanding the Mayor's directive that he not. The City finds it interesting that the person who caused the controversy in which the City found itself embroiled in late September, 1997 took it upon himself to be away from the City at the very time it was crucial to determine how best to protect the rights of the taxpayers of the City of Oconto.

The City contends that Ottensmann followed the appropriate steps of discipline. It is the view of the City that the grievant's actions constituted three separate items of insubordination. Those items rise to the level of flagrant misconduct, contends the City.

In its reply brief, the City contends that Ottensmann did not become aware that the building permit had been illegally issued until after August 13, 1997. The City contends that the grievant knew, or should have known, that the information he needed to provide the property owner's list was available in City Hall. In April he was asked to prepare a list of property owners. He claims that he used City records to compile that list. When it was discovered in September that the information was inaccurate, the grievant claims that he ignored the City's information and went to the County Courthouse to review the records of the Register of Deeds. The City characterizes the grievant's use of County, rather than City records, as defiance.

The Union contends that during the spring of 1997, two noteworthy events occurred: the grievant's position became part of the bargaining unit represented by Teamsters Local 75 and the City hired Michael Ottensmann as the grievant's supervisor. In the Union's view, those two actions resulted in the termination of the grievant.

The Union contends there was no just cause for discharge. The Union contends that attendance at the seminar was not cause for discharge. The Union contends that the Mayor never issued an order directing the grievant not to attend the seminar. The Union points to the testimony of the Mayor where he conceded that he merely told the grievant that if he went to the seminar, he "may be on his own". The Mayor testified to a long-standing policy that

employes had to get permission from the Council to go to conferences or seminars. There was no evidence of any such long-standing policy. On cross-examination, the Mayor explained that he wanted the grievant to stay in Oconto because of issues surrounding the Imig building permit. However, he never told the grievant that he wanted him to stay in Oconto to handle the Imig matter.

The Union contends that the identification of property owners was not just cause for discharge. The grievant testified that he used the City property records for the first list. When Ottensmann told him the list was incorrect, the grievant used the more up-to-date County records. The Union notes that the City attacks the grievant for getting information from the County records, but even Ottensmann testified that County property records are the most accurate because they are the source for City property records. The Union notes that the Employer has attacked the grievant for the issuance of the Imig building permit. That, however, was not the grounds set forth in the discharge letter.

The Union notes that Ottensmann admitted on cross-examination that he knew before August 13 that the permit had been issued. He said he discussed the building permit with the grievant during the summer and before the grievant's settled discipline, to make sure the building permit conformed to an ordinance regarding split plats. Several months before he discharged the grievant, Ottensmann knew that the building permit had issued in advance of a final Council vote on the extension of water service, and Ottensmann did nothing to discipline or reprimand the grievant. Ottensmann implicitly condoned the issuance of the permit.

The Union contends that shooting an eight by two grid is not cause for discharge. Notwithstanding the disputed testimony on the precise direction given, when Ottensmann asked the grievant to shoot another grid point, he did so immediately and without protest. There was no reprimand at the time. Ottensmann testified that he did not consider the incident to be a case of insubordination but merely a case of negligence.

It is the Union's view that the grievant was subject to the progressive discipline provisions of the contract. Clearly, there was no progressive discipline, and the discipline imposed is defective for that reason alone. The City is not free to bypass progressive discipline by saving up infractions in the hope of making a case of flagrancy. The very purpose of progressive discipline is to warn employes of the possibility of termination, and to give them an opportunity to reform before their aggregate misconduct warrants discharge.

The Union contends that the absence of a plumber's license does not mitigate an unjust termination. The Union contends that I should not consider the City's new grounds for termination. Rather, the discharge must stand or fall upon the reason given at the time of discharge. The Union alleges that Ottensmann conceded that the grievant never represented

that he had a plumber's license, and there was nothing in his personnel file to suggest that he had a plumbing license. The grievant testified without contradiction that under State law, he does not need a plumbing inspector's license to issue building permits or complete other aspects of his job. The grievant has competently performed all aspects of his job without such a license.

DISCUSSION

The City terminated the grievant for three reasons. At hearing, and in its brief, the City argues that progressive discipline is not applicable because the behavior, either individually or combined, constitutes flagrant behavior within the meaning of the collective bargaining agreement. The City does not contend that the lack of licensure is a basis for discharge, rather the City contends that it is a bar to the reinstatement of the grievant.

Article 19 of the collective bargaining agreement requires progressive discipline for all matters excepting certain "flagrant" behavior. The use of the term "flagrant" conjures up images of behavior so glaring, notorious, outrageous, and/or shocking that it can neither escape notice nor be condoned. The term takes on further meaning in the context in which it is used. In the parties' collective bargaining agreement, "flagrant" behavior is that behavior which may warrant discharge with no warning notice required nor progressive discipline due. It is used to continue a sentence which describes dischargeable behavior such as "dishonesty, being under the influence of intoxicating beverages while on duty, drug addiction, or other flagrant violations." That is the standard against which the termination is measured.

On August 19, 1997, the parties agreed to a resolution of certain discipline which had been imposed on August 13. On its face, paragraphs c and d limit the applicability of the August 13 discipline to future matters. As a practical matter, the discipline, and the incident surrounding it, should certainly have served to put the grievant on notice that the Employer was dissatisfied with some aspect of his work performance. Ottensmann's testimony summarizes the attitude of the parties relative to the grievant's disciplinary status as of August 13.

The most egregious of the three incidents relied upon by the City was the grievant's attendance at a conference. There is little dispute that the grievant originally had permission to attend the LaCrosse conference. Testimony conflicted as to precisely how he asked and/or announced that he would attend the conference, but his testimony was that in response to Ottensmann's request that he indicate how much the conference would cost, he produced a document summarizing those costs. That document was made an exhibit in the hearing. Additionally, Mayor Utecht testified that in his conversation with Ottensmann, Ottensmann had indicated that he believed that he had the authority to grant the grievant's attendance.

It was the Mayor's testimony that Ottensmann lacked such authority, and only the Mayor and Council could grant permission to attend such a conference. However, the record does not support the existence of any such policy. It was the Mayor's testimony that the policy was not in writing, nor had it ever been considered or passed by the City Council. There were no examples of the application of the policy provided. The grievant testified that he had never heard of the policy and that he had never previously needed approval to attend the same and/or other conferences. Ottensmann, who was new, was unaware of the policy. The Mayor's version of the telephone conversation made no reference to any such policy, *per se*.

There is a dispute as to the content of the conversation between the Mayor and the grievant. Under the grievant's version of the conversation, there was no order given that he not attend the conference. Given the grievant's view of the conversation, it was a fair inference that the Mayor's reference to being "on his own" was a reference to paying the cost of the conference. As the conversation was described by the grievant, there was no aspect of it that would fairly put him on notice that his attendance at the conference was job-threatening. However, he was certainly made to understand that the Mayor was reluctant to have him attend the conference.

Under the Mayor's version of the conversation, there was no order directing the grievant not to attend the conference. Under the Mayor's version of the conversation, he indicates that he is "not going to allow him (the grievant) to go." In isolation, the remark is directory. However, the Mayor contends that he followed the remark by indicating that if the grievant went, he would be on his own. That remark was repeated. If the Mayor intended to order the grievant not to go to the conference, it is unclear to me as to the purpose of "you're on your own." The grievant testified that he understood the remark to be a reference to who would have to pay for the cost of the conference. His testimony in that regard is consistent with the Mayor's claim that the grievant replied that the fee had already been paid. I believe the Mayor's message was ambiguous.

The Employer uses a military, or para-military analogy. I believe the analogy fails for two reasons. First, this is not a para-military situation. The second, and more compelling, is that no military-style order was issued. There was no direct, unequivocal, clear order issued. If it was the intent of the Mayor to order the grievant to stay in Oconto and not attend the conference, I believe it was incumbent upon him to make that clear. That is particularly the case where the Employer relies upon this conversation as grounds for a termination based upon willful insubordination.

The grievant returned from his conference on September 26. The Mayor never talked to him about the matter. No one said a word about his attendance at the conference. If, as is

now alleged, he had been ordered not to attend the conference, and did so in stark defiance of that order, I find the Employer's post-conference behavior odd. Odder yet, is the fact that the grievant submitted additional expense vouchers for the conference, and was paid on October 7, 1997.

The context of this event included the controversy surrounding the Imig permit. All parties were certainly aware of the controversy that surrounded the issuance of that building permit. I believe the grievant's behavior demonstrated a lack of sensitivity, judgment, and potential inattentiveness to work. Had the Mayor explained his concerns and reservations and the grievant ignored them, I would have regarded his conduct as more serious. Had the Mayor issued an order, and the grievant defied it, I would have regarded that to be insubordination. However, neither of those occurred.

The Employer contends that the grievant could have, and should have, called Ottensmann. Perhaps so. However, Ottensmann did not call the grievant either. Ottensmann was aware of the fact that he had granted permission for the grievant to attend the conference. Ottensmann was further aware that the Mayor disapproved of the grievant's attendance at the conference, and why. Ottensmann was squarely in the middle of a potential controversy. A phone call from Ottensmann to the grievant could have served to eliminate any ambiguity in the Employer's position relative to attendance at the conference.

Under the circumstances set forth in this case, I believe that the grievant's attendance at the conference, following his discussion with the Mayor, does not rise to the level of a flagrant act within the meaning of the collective bargaining agreement. It is an exercise of questionable judgment which is subject to progressive discipline.

The second matter leading to this discharge was the grievant's role in the Imig permit and subsequent notice to homeowners. The genesis of trouble in this entire dispute was the issuance of a building permit prior to notice of water extension. This act was not a basis for discharge. The permit was issued in April. The record establishes that Ottensmann was aware that the building permit had been issued prior to August 13.

Both Ottensmann and Mayor Utecht were in attendance at the April committee meeting where Imig had been promised a permit. It was Ottensmann who offered to send the notice letter. Ottensmann delegated the research task to the grievant who committed error in his two records searches. The problems emanating from the Imig matter were compounded by the grievant's April error which resulted in two property owners not being notified.

The grievant was asked to redo his work in September, and again came back with erroneous information. Nothing in this record suggests that either of these errors were insubordination, intentional and/or malicious. They appear on their face to be the product of negligence or superficial workmanship. The Employer invoked no discipline for either of these matters at the time.

When told to repair his work in September, the grievant used a County, as opposed to a City record, to obtain addresses. The City argues that his use of County records is evidence of insubordination and/or non-cooperation. I disagree. The grievant had used City records and had been in error. The fact that he tried a different source suggests that he considered the possibility that his source of information was a problem. Ottensmann testified that when he discovered the April errors, he indicated that he would go to the County to get a corrected list. It was his testimony that there existed some chance that a recent change in address may not have been picked up by the City records. The County is the source of City records.

The grievant was the one who actually did the research. In anticipation of his discharge, Ottensmann sent the grievant a document which outlined the grievant's alleged failings, and invited a response. That document (Joint Exhibit No. 8), indicates that the grievant "was directed to go to the County tax listing office and confirm the accuracy of the roll."

The letter of termination indicates the grievant "failed to properly identify true property owners." The use of the term "failure" suggests a lack of success, in contrast to a notion of willful refusal.

This record does not support a finding that the grievant's use of County records was insubordinate, defiant, or otherwise inappropriate. His continuing to bring back erroneous information may well be evidence of a lack of effort or ability. If this conduct is disciplinable, the collective bargaining agreement requires progressive discipline.

The third grounds for discipline was the grievant's failure to properly shoot a survey. On its face, the conduct appears to be a minor matter. Ottensmann's summary of incidents letter (Joint Exhibit No. 8), indicates that the grievant's failure was that he shot an eight by two grid when instructed to do a three by four grid. Ottensmann testified that the key fault was the grievant's failure to take a third shot near the house.

In referencing this matter, the termination letter indicates the grievant "failed" to properly follow instructions. Again, the use of the term "fail" is used instead of a term indicating a more willful and/or defiant behavior.

When the incident occurred, Ottensmann directed the grievant to redo the shot. The grievant promptly did so. There was seemingly no other reaction. To the extent this was rank insubordination, the Employer's non-reaction is quizzical. The event occurred on September 3. There was no reaction until Ottensmann identified this as a performance flaw in anticipation of the October 13 discharge. On direct examination, Ottensmann testified that he assumed the grade incident was negligence.

In its post-hearing brief, the Employer takes issue with the grievant's testimony in this matter, alleging it to be inconsistent with his written response to Ottensmann's inquiry. The grievant's written response consisted of a general explanation of his behavior in this incident. His response did not respond to and/or address Ottensmann's reference to a four by three versus eight by two grid.

I regard this as a relatively inconsequential event. To the extent it rises to the level of disciplinable behavior, the contractual progressive discipline clause is applicable.

It is my conclusion that none of the events cited by the Employer rises to the level of a flagrant act. I regard the grievant's attendance at the conference as an act of questionable judgment. It was not an act of willful insubordination. I regard the grid shot and the errors in homeowner research to be, at most, examples of poor work. I believe that the progressive discipline provision of the contract is applicable, and was not satisfied.

I believe that the Imig permit and its aftermath underlies all of this. Suffice it to say, that the key events occurred, and were known, prior to mid-August. The events relied upon by the Employer do not justify discharge.

AWARD

The grievance is sustained. There was not just cause for the termination of R.B.

REMEDY

Article 19 of the contract addresses the appropriate remedy. The City contends that reinstatement is not available because the grievant lacks a license necessary to perform his work. In light of the Employer's claim that the grievant lacks the minimum certification required by law and by his job description, I have not directed a specific remedy, if any is applicable. I do not believe the record to be adequate to that task.

JURISDICTION

I direct the parties to attempt to fashion an appropriate remedy. I will retain jurisdiction for the purpose of resolving any dispute as to remedy.

Dated at Madison, Wisconsin this 9th day of September, 1998.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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